

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment : 02.01.2019	Date of Pronouncing Judgment 01.02.2019.
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The Honourable Mr. Justice M.M. Sundresh
and

The Honourable Mr. Justice Krishnan Ramasamy

Original Side Appeal Nos. 81 and 94 of 2018
and
C.M.P.No. 5997 of 2018

M/s. Galaxy Properties Private Limited,
rep. By its Director,
Mr. M. Mohammed Ibrahim
Having their registered Office at
No. 8, Old No. 49, Radha Mohan Street,
Velachery, Chennai - 600 042.

... Appellant in O.S.A.No. 81 of 2018
&
... Respondent in O.S.A.No. 94 of 2018

Vs.

Puravankara Projects Limited,
rep. By its Joint Managing Director,
Mr. Ashish Puravankara
Having their Registered Office at
131/1, Ulsoor Road,
Bangalore - 560 042.

... Respondent in O.S.A.No. 81 of 2018
... Appellant in O.S.A.No. 94 of 2018

Prayer in both Appeals :

Appeals filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent, against the fair and decretal order dated 20.02.2018 made in O.P.No. 433 of 2017 on the file of this Court.

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, to set aside the award dated 22.12.2016 and the Additional award dated 22.02.2017 passed by the Sole Arbitration in the matter Arbitration and Conciliation Act 1996.

For Appellant in O.S.A.No. 81 of 2018

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: Mr. T.V. Ramanujam SC for

For Respondent in O.S.A.No. 94 of 2018

M/s. R. Ramya

For Appellant in O.S.A.No.94 of 2018

} : Mr.T.R.Rajagopalan SC
For Respondent in O.S.A.No.81 of 2018 Mr.Ravikumar Paul
Senior Counsel
Mr.Joshua Samuel
for M/s.Paul and Paul

COMMON JUDGEMENT

Krishnan Ramasamy, J.,

Both these Original Side Appeals are preferred, one by M/s. Galaxy Properties Private Limited, and other by Puravankara Projects Limited, aggrieved by the order passed by the learned Single Judge, dated 20.02.2018 made in O.P.No.433 of 2017. They are hence heard together, and they stand decided/disposed of, by this common Judgment.

2. It would be appropriate to notice that the aforementioned Original Petition has been preferred by Puravankara Projects Limited aggrieved by the award passed by the Arbitral Tribunal dated 22.12.2016.

3. For the sake of narrative convenience, the parties herein shall be referred to as per the rank assigned in the arbitration proceedings, i.e. M/s.Galaxy Properties Private Limited will be referred to as 'Claimant' and Puravankara Projects Limited as 'Respondent'.

4. Facts of the case, which led to the filing of these Appeals in gist and kernel are as follows : -

i) Both the claimant and the respondent are the Companies incorporated under the provisions of the Companies Act, 1956 and are engaged in the real estate business. In the year 2006, the respondent was looking to procure 1000 acres of land abutting the NH-4 Chennai-Bangalore National Highway Road. Therefore, the respondent approached the claimant to facilitate them for procuring 1000 acres of land and both the parties entered into a Memorandum of Understanding (MOU) on 22.11.2006, marked as Ex.C.3.

ii) As per the said MOU, either the claimant or its associated/subsidiaries Companies have to purchase 1000 acres of land in one conjoint and contiguous block situate in the Villages specified in the MOU for the respondent. The consideration for such purchase was fixed at Rs.38 lakh per acre for 450 acres of land and Rs.35 lakh for the remaining 550 acres. The period, within which, the acquisition has to be completed was 5 to 6 months. The respondent paid an advance of Rs.12 crore and Rs.10 lakh to the claimant and their two associated Companies, viz., Greenland Estates Pvt Ltd., and

Money Worth Estates Private Ltd. under three receipts, all dated 04.05.2007, marked as Exs. C.23 to C.25.

iii) The claimant has two incorporated subsidiary Companies, viz., M/s.Nile Developers Pvt. Ltd. (NDPL) and M/s. Vaigai Developers Pvt. Ltd., (NDPL) and the said two Companies were brought into existence for the purpose of acquiring lands in their names to transfer the same in favour of the respondent as per the terms of MOU. An extent of 23.7134 acres of land was acquired in the name of NDPL and 19.08 acres of land was acquired in the name of VDPL and sale deeds were executed in respect of the said purchase.

iv) Apart the aforesaid two subsidiary Companies, the claimant also purchased lands in the names of other subsidiary Companies, viz., i) Newton Developers Pvt. Ltd., ii) M/s. People Estates Pvt. Ltd. iii) M/s. Centum Properties Pvt. Ltd., iv) M/s. Good Time Properties Pvt. Ltd., v) M/s. High Value Estates Pvt. and vi) M/s. Trend Properties Pvt. Ltd.

v) However, the claimant was unable to complete the acquisition within the time stipulated in the MOU. Hence, the claimant sought for extension of time to complete the contract. In addition to the said request, the claimant also requested the respondent to increase the sale consideration payable to the respondent uniformly at Rs.50,00,000/- per acre for the lands to be acquired and insofar as the lands already acquired as on 22.11.2007 over and above Rs.50,00,000/- per acre, the claimant sought to reimburse the cost of stamp duty and registration charges.

vi) Accordingly, an amended MOU was entered into between the parties on 22.11.2007, marked as Ex.C.6, whereby, the sale consideration payable to the respondent was fixed at an uniform rate of Rs.50,00,000/- per acre for the lands to be acquired and in respect of the lands already purchased over and above Rs.50,00,000/- per acre, the respondent agreed to reimburse the stamp duty and registration charges over and above the amount agreed upon to be calculated on a sum not exceeding Rs.50,00,000/- per acre and the time limit was extended till 31.08.2008.

vii) In pursuance of MOU and amended MOU, the claimant's two subsidiary Companies, viz., NDPL and VDPL and the respondent entered into share purchase agreements dated 22.11.2007 marked as Exs.C.7 and C.8. As per the said agreements, 100% shares standing in the names of NDPL and VDPL have to be transferred to the respondent at the rate of Rs.54.50 lakh per acre, irrespective of at what rate the claimant purchased the land. The claimant acquired the land measuring an extent of 23.7134 acres at the rate of Rs.83 lakh in the name of NDPL and 19.08 acres at the rate of Rs.81 lakh per acre in the name of VDPL,

totally, to an extent of 42.79 acres.

viii) Since as per the terms of MOUs, the claimant had to procure 1000 acres of land abutting the NH-4 Chennai to Bangalore road, and in the Villages specified thereunder within 31.08.2008, the claimant spent more amount than Rs.50,00,000/- per acre fixed in the MOUs, and thereby, they incurred a loss of Rs.11.92 Crore, in respect of 42.79 acres of land.

ix) Since the claimant was unable to procure 1000 acres of land within the specified time in the amended MOUs and also expressed difficulty to complete the contract, in June, 2009, both the parties decided to abandon the MOUs by mutual consent. Accordingly, both the MOUs were abandoned and thereafter, the parties were discussing the method of disgorging the benefits derived under the MOUs.

x) In October, 2010 the respondent was in need of funds for the purpose of completing the sale transaction after cancelling a joint development agreement/Ex.C.2 with another Company M/s.Peacock Finvest Pvt. Ltd, dated 01.11.2006. Therefore, the respondent requested the claimant to refund the advance sum of Rs.10 crore paid by them under three receipts to the claimant and their two associated Companies with interest at the rate of 12% p.a. This arrangement was a part of the understanding between the parties that they parties will restore status-quo ante, viz., each one will disgorge the benefits derived under the MOUs. As per the said arrangement, the claimant refunded Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) to the respondent and the respondent received the same by way of demanded draft, dated 22.10.2010. So far as the balance advance sum of Rs.2 crore is concerned, the same was already refunded to the respondent on 22.11.2007, vide cheque dated 28.11.2007, marked as Ex.C.5. In this regard, there were many correspondences via. e-mail between the parties from 18.06.2008 to 22.10.2010, marked as Exs.C.13, C.14, C.15, C.17 and C.18. The entire advance amount received by the claimant was refunded and the three receipts issued by the respondent at the time of entering into MOU dated 22.11.2006 were annulled under three cancellation deeds dated 22.10.2010, marked as Exs.C.23, 24 and 25.

xi) Thereafter, since both the MOUs were abandoned and the claimant refunded the advance sum of Rs.10 Crore, the respondent had to retransfer the shares of NDPL and VDPL in favour of the claimant. The claimant received a letter dated 02.04.2011 from Mr.Ashish Puravankar, the Joint Managing Director of the respondent, indicating that the respondent was constrained to wriggle out of their obligation to re transfer the 100% shares standing in the names of NDPL and VDPL in respect of 42.79 acres of land in favour of the claimant. Hence, the claimant invoked

the arbitration clause and issued a legal notice dated 18.07.2011, marked as Ex.C.37. Subsequently, filed Original Application under Section 9 of the Arbitration and Conciliation Act, 1996, in O.A.No.598 of 2011, restraining the respondent from in any manner alienating/encumbering the lands described in the schedule to the Jude's summon.

xii) The said Original Application was dismissed by the learned Single Judge, vide order, dated 25.07.2012. Against the said dismissal, the claimant filed O.S.A.No.283 of 2012, which was allowed by the Hon'ble Division Bench, by judgment dated 20.12.2012. Challenging the said judgment, the respondent preferred Special Leave Petition, in S.L.P.(C) No.9473 of 2013. The Honourable Supreme Court, vide order dated 17.04.2014, appointed Honourable Justice J.Kanakaraj (retd.) as Learned Arbitrator to resolve the disputes. In pursuant to the same, the claimant filed claim statement before the learned Arbitrator. The learned Arbitrator vide award dated 22.12.2016 though not granted the main relief sought for by the claimant with regard to retransfer of the lands standing in the names of NDPL and VDPL in their favour, however, granted the alternate relief of compensation of Rs.11.90 crores with 12% interest p.a. from the date of award and till the date of realization.

xiii) Aggrieved over the award passed by the Arbitral Tribunal, the respondent preferred Original Petition No.433 of 2017 before this Court. The learned Single Judge, by impugned order, dated 20.02.2018 modified the award of the learned Arbitrator, by reducing the compensation. It is against the said order, the present Appeals have been preferred by both the claimant and the respondent, as indicated in the preamble portion of this judgment.

5. Mr.T.V.Ramanujam, learned Senior Counsel appearing for the claimant advanced his arguments contending that both the claimant and the respondent are in the real estate business. The respondent was looking in for procuring 1000 acres of land, for which purpose, they approached the claimant and a MOU/Ex.C.3 was entered into between the parties. As per the MOU, the claimant was required to purchase 1000 acres of land within 5 to 6 months' time. Since as per the MOU, the claimant was required to purchase lands only in the Villages specified in the MOU, the claimant found it difficult to complete the contract. Hence, the claimant made a request to the respondent to enable them to purchase land in Selvezhimangalam and Mamalpattu Villages and also sought for extension of time to complete the contract. In addition to the same, the claimant requested the respondent to increase the sale consideration payable to the respondent uniformly at Rs.50,00,000/- per acre for the lands to be acquired and insofar as the lands already acquired as on 22.11.2007 over and above Rs.50,00,000/- per acre, the claimant

sought to reimburse the cost of stamp duty and registration charges. Therefore, an amended MOU was entered into between the parties on 22.11.2007, marked as Ex.C.6, whereby, the sale consideration payable to the respondent was fixed at an uniform rate of Rs.50,00,000/- per acre for the lands to be acquired, and in respect of the lands already purchased over and above Rs.50,00,000/- per acre, the respondent agreed to reimburse the stamp duty and registration charges not exceeding Rs.50,00,000/- per acre and the time limit to complete the acquisition was extended till 31.08.2008.

5.1 It is further contended that, as per the amended MOU, the respondent has to pay the stamp duty and registration charge in respect of the lands to be acquired and already acquired by the claimant, and in order to avoid incurrence of stamp duty, the respondent suggested that 100% shares standing in the names of NDPL and VDPL shall be transferred in their favour. The claimant eventhough incurred a loss of Rs.11.92 crore in respect of 42.79 acres of land, hoping that entire 1000 acres will be purchased by the respondent and in the subsequent sale deeds, the loss could be adjusted, agreed for such transfer in favour of the respondent. Thus, in this regard, the claimant, and it's subsidiary Companies (NDPL and VDPL) and the respondent entered into share purchase agreements/Exs.C.7 and C.8, on the same day i.e 22.11.2007, on which date, amended MOU was entered into. Thus, as per the share purchase agreements, 100% shares standing in the names of NDPL and VDPL were transferred in favour of the respondent, as per the terms and conditions stated thereunder. Further, in the said share purchase agreements, consideration was also fixed and the same was also paid.

5.2 It is further contended that since as per the terms of MOU/Ex.C3, the claimant had to procure 1000 acres of land abutting the NH-4 Chennai to Bangalore road, that too, in the Villages specified in the MOUs within 31.08.2008, the claimant spent more money than Rs.50,00,000/- per acre fixed in the MOU in respect of purchase of 42.79 acres of land alone, and thereby, incurred a loss of Rs.11.92 crore. Due to such loss, the claimant was unable to purchase remaining extent of land. Therefore, the claimant expressed the difficulty to perform the contract within the time prescribed in the amended MOU. Thereafter, in June 2009, both the parties mutually agreed to abandon the MOUs. All these facts were, in fact, admitted by the respondent, as evident from various correspondences between the parties, via., e- mails and also at the time of cross examination of R.W.1. In view of abandonment by mutual consent, both MOUs become impossibility of performance and thereafter, the parties were discussing the method of disgorging the benefits derived under the MOUs.

5.3 It is further contended that even the respondent

admitted the fact that the lands purchased by the claimant in the names of subsidiary Companies, i.e. NDPL and VDPL were transferred in favour of the respondent for a consideration of Rs.50,00,000/- per acre only plus registration charges and stamp duty, eventhough an extent of 23.7134 acres was purchased at the rate of Rs.83 lakh in the name of NDPL and the land measuring 19.08 acres was purchased at the rate of Rs.81 lakh per acre in the name of VDPL, and thereby, the claimant incurred a loss of Rs.11.92 crore, in respect of 42.79 acres of land alone, as indicated above. The said loss has to be recouped/compensated by the respondent along with interest from the date of abandonment of the MOUs. While that be so, in October 2010, since the respondent was in need of funds for the purpose of completing the sale transaction after cancelling a joint development agreement with another Company M/s.Peacock Finvest Pvt. Ltd., the respondent requested the claimant to refund the advance sum of Rs.10 crore paid by them under three receipts to the claimant and their two associated Companies with interest at the rate of 12% p.a. This arrangement was a part of the understanding that the parties will restore status-quo ante, viz., each one will disgorge the benefits derived under the MOUs. Accordingly, the claimant refunded Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) to the respondent and the respondent received the same by way of demanded draft, dated 22.10.2010. So far as the balance advance sum of Rs.2 crore is concerned, the same was already refunded to the respondent on 22.11.2007, vide cheque dated 28.11.2007, marked as Ex.C.5. There was an understanding between the parties that the respondent would transfer the lands standing in the names of NDPL and VDPL, (which were transferred to the respondent in pursuance of MOUs) in favour of the claimant. In this regard, there were many correspondences between the parties via. e-mail from 18.06.2008 to 22.10.2010. Since the entire amount received by the claimant towards advance was refunded, the three receipts issued by the respondent at the time of entering into MOU dated 22.11.2006 were annulled under three cancellation deeds dated 22.10.2010, marked as Exs.C.23, 24 and 25.

5.4 The learned Senior Counsel, therefore, contended that the respondent was able to cancel the joint development agreement entered into with M/s.Peacock Finvest Pvt. Ltd., only by utilizing the amount refunded by the claimant and the sale deeds executed in that regard, marked as Exs.C.21 and C.22 would disclose the said fact. Even after the same, i.e. after 22.10.2010, both the parties were discussing about the re-transfer of the lands standing in the names of NDPL and VDPL in favour of the claimant. However, all of a sudden, the claimant received a letter dated 02.04.2011 from Mr.Ashish Puravankar, the Joint Managing Director of the respondent, indicating that they were constrained to wriggle out of their obligation to

retransfer the 100% shares standing in the names of NDPL and VDPL, as agreed earlier. Hence, the claimant invoked the arbitration clause contained in MOUs/Exs.C.3 and C.6 and sent a legal notice dated 18.07.2011 to the respondent, inter alia stating that the respondent had to re-transfer the shares of NDPL and VDPL in favour of the claimant. The respondent, despite receipt of such notice, did not send any reply, rather proceeded to develop the properties in respect of NDPL and VDPL.

5.5 Thus, the learned Senior Counsel contended that the claimant, having left with no other option, invoked the arbitration clause and filed Original Application under Section 9 of the Arbitration and Conciliation Act, 1996, in O.A.No.598 of 2011, seeking a direction to restrain the respondent from in any manner alienating or encumbering the lands described in the schedule to the Judge's summon and obtained an order of status-quo vide order dated 20.07.2011. However, the learned Single Judge vide order, dated 25.07.2012 dismissed the Original Application, against which, the claimant filed O.S.A.No.283 of 2012 before the Honourable Division Bench. The Honourable Division Bench, by judgment dated 20.12.2012 rightly allowed the said O.S.No.283 of 2012. Challenging the said judgment, though the respondent preferred Special Leave Petition, in S.L.P.(C) No.9473 of 2013 before the Honourable Supreme Court and the Honourable Supreme Court, vide order dated 17.04.2014, appointed Honourable Justice J.Kanakaraj (retd.) as Learned Arbitrator to resolve the disputes.

5.6 The learned Senior Counsel further contended that in pursuant to the order passed by the Hon'ble Supreme Court, the claimant filed a claim statement before the learned Arbitrator dated 28.06.2014, seeking for a direction, directing the respondent to retransfer the schedule mentioned lands standing in the names of NDPL and VDPL in their favour or in favour of their subsidiaries/nominees with a further direction upon the respondent to pay them a sum of Rs.485,02,99,781/- towards damages with 12% interest from the date of claim statement till date of payment. The respondent filed a counter statement and counter claim, dated 13.09.2014 before the Arbitral Tribunal. Before the Arbitral Tribunal, the claimant produced 75 documents and examined one witness (C.W.1), whereas, the respondent had produced only 21 documents and examined one witness (R.W.1). The learned Arbitrator, after hearing the parties and perusing the oral and documentary evidence passed an award dated 22.12.2016, in and by which, the main relief sought for by the claimant with regard to retransfer of the lands standing in the names of NDPL and VDPL in their favour was rejected. However, granted an alternative relief of compensation of Rs.11.90 crores with 12% interest p.a. from the date of award and till the date of realization and subsequently, pursuant to the memo filed by the claimant seeking to rectify the

computation errors occurred in the Arbitral Award, the compensation was altered as Rs.24,68,10,000/- instead of Rs.24,56,20,000/-.

5.7 The learned Senior Counsel, therefore, contended that the award passed by the Arbitral Tribunal was purely based on oral and documentary evidence. However, against the said award, the respondent preferred Original Petition No.433 of 2017 and the learned Single Judge, by an impugned order, dated 20.02.2018 modified the award of the learned Arbitrator, by reducing the compensation amount to Rs.4,12,25,893/- and restricting the interest from the date of the award. Since the order passed by the learned Single Judge is purely on surmises and conjectures and not based on the pleadings and evidence adduced by both the parties, the claimant has preferred the present O.S.A.No.81 of 2018.

6. Finally, the learned Senior Counsel appearing for the claimant summed up his arguments by stating that, since the claimant was not able to perform their part of the contract within the time stipulated in the MOUs, it is agreed by both the parties to abandon the MOUs in the year 2009 and there were discussions/negotiations going on between the parties in regard to the method of disgorging the benefits derived under the MOUs. These are all admitted facts by both the claimant and the respondent and the respondent also admitted the same even at the time of cross-examination. Further, the same was proved through documentary evidence, viz., the correspondences between the parties, via. e-mails, marked as Exs.C.13, C.14, C.15, C.17 and C.18. Even the respondent admitted the fact that the lands purchased by the claimant in the names of the associated Companies of the claimant were transferred in their favour for a consideration of Rs.50 Lakh per acre plus the registration charges and stamp duties, due to which, the claimant incurred loss of Rs.11.92 crore. The documents, more particularly, the workings on sale of shares in the names of NDPL and VDPL has been marked before the Arbitral Tribunal as Ex.C.75 through R.W.1, and the said document shows that the loss incurred by the claimant in respect of purchase of 42.79 acres of land in the names of the sister Companies is Rs.11.92 crore and it is owing to such loss, both the parties mutually agreed to abandon the MOUs.

7. Therefore, it is the contention of the learned Senior Counsel for the claimant that the respondent has to compensate the loss incurred by the claimant along with interest from the date of abandonment of the MOUs. But, as an alternate arrangement, the parties negotiated for the purpose of retransfer of the lands standings in the names of NDPL and VDPL in favour of the claimant. The respondent also agreed for such transfer. The learned Senior Counsel further contended that

even the various e-mail correspondences between the parties would clearly show that there were negotiations from the date of abandonment of MOUs and at one point of time, the respondent agreed to re-transfer the lands in favour of the claimant. However, to the shock and surprise, Mr. Ashish Puravankar, the Joint Managing Director of the respondent issued a letter dated 02.04.2011 to the claimant indicating that the respondent was constrained to wriggle out of their obligation to retransfer the 100% shares standing in the name of NDPL and VDPL, as agreed earlier.

8. The learned Senior Counsel contended that when both the claimant and the respondent mutually agreed to abandon the MOUs and since the respondent requested the claimant to refund the advance sum of Rs.10 crore with interest at 12% p.a in pursuance of abandonment of MOUs and there was an arrangement between the parties that they will restore status-quo ante, viz., each one will disgorge the benefits derived under the MOUs, the claimant believing that the respondent would re transfer the lands standings in the names of NDPL and VDPL in favour of the claimant, refunded the advance sum of Rs.10 crores to the respondent. Therefore, it is not open to the respondent to resile from their stand and say that they want to wriggle out of such obligations under the MOUs on the ground that once the obligations under MOUs got abandoned, neither the claimant nor the respondent can make any claim against each other.

9. The learned Senior Counsel also fairly admitted that the claimant sought time for payment of the amount for the purpose of re transfer of the shares standing in the names of NDPL and VDPL by the respondent in favour of the claimant or their subsidiaries/nominees. The claimant also informed the respondent that they have investors, who are willing to repurchase the shares in respect of NDPL and VDPL and once the investors are identified, the claimant would repay the consideration received under the share purchase agreements to the respondent together with interest. Therefore, it is contended that since the respondent resiled from the earlier stand and sent a letter stating that they want to wriggle out of their obligation under MOUs to re-transfer the shares, it necessitated the claimant to initiate arbitration proceedings against the respondent.

10. The learned Senior Counsel further argued that the stand taken by the respondent that the arbitration proceedings without impleading the shareholders, NDPL and VDPL is not maintainable is not sustainable in the light of the fact that when the matter went up before the Hon'ble Supreme Court, by way of Special Leave Petition by the respondent, similar plea was taken, and notwithstanding such plea, they themselves agreed to refer the dispute before arbitration, and based on the consent

of both the parties, the Hon'ble Supreme Court disposed of the Special Leave Petition with an observation that, 'irrespective of whether or not, there is an arbitration agreement, it would be appropriate, if the dispute between the parties were resolved through the process of arbitration and as per the arbitration clause, the learned Arbitrator will decide all the issues, and appointed Hon'ble Justice Kanakaraj (retd.) as Sole Arbitrator to resolve the dispute. Thus, pursuant to the such order, the claimant filed claim statement before the Arbitral Tribunal and Arbitral Tribunal, after hearing both the parties and considering the evidence let in by both the sides and their written submissions, came to the conclusion that Exs.C.23 to 25 were cancellation deeds, in and by which, the transaction covered under three receipts alone were cancelled and it was perhaps done with accord and satisfaction, and insofar as the MOUs were concerned, the same were not cancelled and there was no accord and satisfaction, as alleged by the respondent. Thus, Arbitral Tribunal by rightly applying Section 56 and 65 of the Contract Act, held that the parties have to disgorge the benefits under MOUs and awarded a sum of Rs.11.90 crore as compensation. Against the said award, the respondent filed Original Petition No.433 of 2017 under Section 34 of the Arbitration and Conciliation Act.

11. The learned Senior Counsel further contended that the power conferred under Section 34 of the Arbitration and Conciliation Act is very limited and the learned Single Judge cannot act as an Appellate Authority while sitting on appeal over the arbitral award nor he has got jurisdiction to go beyond the scope of Section 34 of the Act. In support of such contention, the learned Senior Counsel relied on the following reported decisions of Hon'ble Supreme Court:-

i) Associate Builders Vs Delhi Development Authority, (2015) 3 SCC 4;

ii) NHAI Vs. ITD Commentation India Ltd., (2015) 14 SCC 21;

iii) Steel Authority of India Vs Gupta Brother Steel Tubes Ltd., 2009 (10) SCC 63;

iv) Fiza Developers Vs. AMCI India Pvt. Ltd.

And

v) P.R. Shah Shares and Stock Brokers Pvt. Ltd., Vs. BHH Securities Pvt. Ltd.

12. The learned Senior Counsel further submitted that the learned Single Judge passed the order solely based on surmises and conjectures and not on the basis of the pleading and evidence adduced by both the parties. In this connection, our attention has been drawn to relevant portions from para Nos.40, 41, 70 and 71 of the impugned order, which are extracted

hereinbelow:-

" 40.GPPL was dependent on the vagaries of the land owners' minds. The strategy, which GPPL wanted to adopt presumably was to purchase the land abutting the road and thereby, prevent the ingress and egress for the land, abutting the road and consequently, throttle them with an intention to purchase the land in the rear portion at a lesser price. Consequently, the land abutting the road would be of higher value and the lands lying deeper inside, for which there would be no pathway to reach the main road, would be of lesser value....

41.This circuitous method was adopted presumably to avoid tax authorities since purchase of huge tracks of land by GPPL would only attract attention and further to also avoid payment of stamp duty and registration charges.....

70. Similarly, on the same day, another cancellation deed was entered into between GPPL, who had received a sum of Rs.5 crores from PPL and GPPL returned back the amount together with interest after deducting TDS. They also agreed that the transaction is cancelled and all obligations and rights of both the parties arisen out of the said receipt ceased with immediate effect and neither party will have any claim against the other on the transaction referred to in the aforesaid receipts.

71. A third agreement of similar nature was entered into between MEPL and PPL since MEPL had received an advance of Rs.4 crores. That amount was also returned. At that stage, the balance between the parties was as follows:-

PPL had paid an advance of Rs.5 crores to GPPL and that had been repaid with interest..

- i. GPPL had also acquired lands in the names of NDPL and VDPL. PPL had effectively taken control of the said two companies.

ii. For purchase of lands by NDPL and VDPL, monies were lent to NDPL and VDPL by GPPL.

iii. Out of the monies lent, GPPL had lent 61.042847%, which had been calculated on the basis that GPPL had lent a sum of Rs.7,83,60,000/-, out of the total sale consideration of Rs.12,83,68,800, by NDPL for 23.7134 acres of land. Consequently, the share of GPPL in the lands would come to 61.04%. However, NDPL had purchased the lands at the rate of Rs.54.5 lakhs per acre as offered by PPL.

iv. Similarly, GPPL had lent a sum of Rs.300 out of the total sale consideration of Rs.1031,08,800/- and the percentage of holding of GPPL in 19.08 acres purchased by VDPL was 0.0002909548%

v. However, NDPL had purchased the lands at Rs.83 lakhs per acres. Therefore, they had actually spent Rs.83 lakhs per acre when they were paid Rs.54.50 lakhs by PPL. They had therefore spent an additional sum of Rs.28.50 lakhs for every acre. For 23.7134 acres, this comes to Rs.6,75,83,190/-. Out of this, the share of GPPL is 61% and that is Rs.4,12,25,745.90/-

vi. Similarly, VDPL had purchased the lands at Rs.81 lakhs per acre and they had purchased 19.08 acres and they were paid Rs.54.50 lakhs per acre by PPL. They had therefore paid an additional sum of Rs.26,50,000/- per acre and for 19.08 acres, this comes to Rs.5,05,62,000/- and out of this, the share of GPPL is Rs.147.11/-.

vii. Therefore, the actual loss

suffered by GPPL is
Rs.4,12,25,893/-.

The above calculation is tabulated
as under:-

S.No.	Description	NDPL	VDPL
1	Contribution of GPPL towards purchase of lands (Rs.)	78360000	300
2	Total sale consideration (Rs.)	128368800	103108800
3	Percentage of contribution of GPPL (%)	61	0.0002909548
4	Consideration per acre fixed in the Additional MOU (Rs.)	5450000	5450000
5	Total area of land acquired (in acres)	23.71340	19.08
6	Additional amount incurred per acre in purchase of lands (Rs.)	2850000	2650000
7	Total additional amount incurred (Rs.)	67583190	50562000
8	Proportionate share of GPPL in additional amount incurred (Rs.)	41225745.90	147.11
	Total (Rs.)		41225893

13. The learned Senior Counsel, therefore submitted that the findings rendered in Para Nos.40, 41, 70 and 71 are not supported either by pleadings or evidence adduced by both the parties but based on surmises and conjecture and by doing so, it is clear that the learned Single Judge has travelled beyond the scope of Section 34, which is not sustainable.

14. The learned Senior Counsel further submitted that the respondent filed Original Petition No.433 of 2017 seeking to set aside the award of the Arbitral Tribunal and in the absence of any issue, plea or argument raised with regard to award of proportionate compensation, the calculation worked out by the learned Single Judge in para Nos. 70 and 71 for the purpose of reducing the compensation, which were based on surmises and conjectures are all unwarranted. Admittedly, the workings on sale of shares in the names of NDPL and VDPL has been marked before the Arbitral Tribunal as Ex.C.75 through R.W.1, and the said document shows that the loss incurred by the claimant in respect of purchase of 42.79 acres of land in the names of the sister Companies is Rs.11.92 crore and based on the same, the Arbitral Tribunal considered and awarded compensation with interest. This was not properly appreciated by the learned Single Judge and based on his own findings and calculation, the learned Single Judge reduced the compensation awarded by the

Arbitral Tribunal from Rs.24,68,10,000/- to Rs.4,12,25,893/- which is not sustainable.

15. The learned Senior Counsel further contended that while passing the order, the learned Single Judge admitted the findings and fixation of award by the learned Arbitral Tribunal, but without any pleading and evidence and submission of both sides, based on his own finding held that the claimant and its associated Companies are different entities, and since the claimant alone initiated arbitration proceedings, denied the compensation to the extent of the shareholders of the claimant, which is totally unwarranted and it would show nothing but total non application of mind on the part of the learned Single Judge.

16. Further, in this regard, the learned Senior Counsel drawn our attention to the terms and conditions stated in the MOUs. As per the terms of MOUs, land measuring 1000 acres can be purchased in favour of the respondent either by the claimant directly or through the sister Concerns concerned, which would clearly show that on behalf of the associated Companies, only the claimant can initiate proceedings and accordingly, the claimant initiated the proceedings against the respondent to pay compensation in terms of MOUs to the claimant and its associated Companies. In such case, there is no necessity to implead its sister concerns.

17. The learned Senior Counsel with regard to the applicability of Section 56 of the Contract Act to the case on hand, referred to provisions of Sections 56 and 65 of the Contract Act, which are extracted hereinbelow:-

Section 56 "An agreement to do an act impossible in itself is void.

A contract to do an act which after the contract is made, becomes impossible, or by reason of some event, which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promises to do something which he knew or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss, which such promisee sustains through the non-performance of the promise.''

Section 65

"Obligation of person who has received advantage under void agreement, or contract that becomes void; When an agreement is discovered to be void, or when a contract becomes void, any person, who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

18. Thus, by referring to Sections 56 and 65, the learned Senior Counsel contended that though due to abandonment of MOUs, both the MOUs become impossible of performance, the claimant has to be compensated for the loss sustained by them, which is of Rs.11.90 crore. In fact, after the abandonment of MOUs, there was an understanding between the parties that each one will disgorge the benefits derived under the MOUs. As per the said understanding, the claimant refunded the sum of Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) viz., the advance amount to the respondent and so far as the balance advance sum of Rs.2 crore is concerned, which was already refunded to the respondent, there was an understanding between the parties that the respondent would transfer the lands standing in the names of NDPL and VDPL, (which were transferred to the respondent in pursuance of MOUs) in favour of the claimant. Since the respondent resiled from their earlier stand and stated that they want to wriggle out from their obligations under the MOUs, which necessitated the claimant to invoke arbitration clause. Therefore, Section 56 of the Contract Act would stand attracted to the case. This aspect was rightly appreciated by the learned Arbitrator and by application Section 56 and 65 of the Contract Act awarded compensation, whereas, the learned Single Judge failed to see this aspect.

19. Further, the learned Senior Counsel with regard to applicability of Section 56 of the Contract Act to the facts of the present case, relied upon the decisions reported in the cases mentioned infra:-

i) AIR (1954) SC 44, Satyabrata Ghose Vs Mugneeram Bangur and Co.;

ii) (2016) 13 SCC 561, Delhi Development Authority Vs. Kenneth Builders and Developers Pvt. Ltd.;

iii) (2017) 14 SCC 80 Energy Watchdog Vs. Central Electricity Regulatory Commission and others.

20. The learned Senior Counsel raised strong objection with regard to the denial of interest from the date of filing of the claimant statement and before the date of filing of the claimant by the learned Single Judge. In this regard, the learned Senior Counsel relied on the decision reported in the case of Hyber Consulting UK Ltd., Vs. Governor State of Orissa [(2015) 2 SCC 189, wherein, the Hon'ble Supreme Court has pointed out three stages, at which, the Arbitrator has powers to award interest and they are:-

i) From the date of cause of action till the date of initiation of arbitral proceedings;

ii) From the date of initiation of arbitral proceedings till the date of arbitral award;

iii) From the date of arbitral award and till the date of realization.

21. Therefore, the learned Senior Counsel submitted that, as per the decision rendered by the Hon'ble Supreme Court, referred to above, the Arbitrator is empowered to award interest on three stages and in the present case, the learned Arbitrator awarded interest only from the date of the award till the date of realization, and further, contrary to the said principle, the learned Single Judge refused to grant any interest from the date of filing of the claim statement till the date of award, which is liable to be set aside. The learned Senior Counsel, therefore, strongly insisted to award interest from the date of filing the claim statement till the date of award and from the date of award till the date of payment of the award amount.

22. Thus, the learned Senior Counsel for the claimant assailed the impugned order passed by the learned Single Judge on the aforesaid grounds and prays for allowing O.P.No.81 of 2018.

23. Per contra, Mr.T.R.Rajagopalan, the learned Senior Counsel appearing for the respondent advanced his arguments by submitting that the MOUs entered into between the claimant and the respondent was only for the purpose of purchase of 1000 acres of land. As per the MOUs, the claimant should have purchased the land within 5 to 6 months' time. However, the claimant was not able to acquire 1000 acres of land within the time specified in the MOU and sought for extension of time to complete the contract coupled with two other prayers, viz., i) to increase the sale consideration payable to the respondent uniformly at Rs.50,00,000/- per acre for the lands to be acquired and ii) to reimburse the cost of stamp duty and registration charges, in respect of the lands already acquired

as on 22.011.2007 over and above Rs.50,00,000/- per acre.

24. Such a request made by the claimant was acceded to by the respondent, and accordingly, an amended MOU was entered into between the claimant and respondent, whereby, the sale consideration payable to the respondent was fixed at an uniform rate of Rs.50,00,000/- per acre for the lands to be acquired and in respect of the lands already purchased, the respondent agreed to reimburse the stamp duty and registration charges to be calculated at a sum not exceeding Rs.50,00,000/- per acre and the time limit was extended till 31.08.2008. Since the claimant informed the respondent that they were not in a position to perform the contract as per the MOUs and expressed difficulty in performing the contract, in the month of June, 2009, both the parties mutually decided to abandon the MOUs. Thereafter, there were communications between the parties via., e-mail in regard to disgorge the benefits derived under the MOUs. In pursuance of one such communication, advance amount was refunded by the claimant and the respondent, in turn, to show their bona fide, cancelled the three receipts issued at the time of entering into MOU/Ex.C3. by executing three cancellation deeds. Therefore, as per the cancellation deeds, all the obligations under the MOUs came to an end and it were executed with full accord and satisfaction. Therefore, the learned Senior Counsel contended that once MOUs were abandon and cancellation deeds were executed, no claim can be made against each others either based on Exs.C.3, C.6 or Exs.C.7 and C.8, and hence, Section 56 of the Contract Act is not applicable to the present case.

25. Further, the learned Senior Counsel pointed out that on the same day, when the amended MOU was entered into, (i.e. 22.11.2007) another share purchase agreements were entered into between the two associated Companies of the claimant, (viz., NDPL and VDPL) and the respondent, in which, consideration was fixed and the same was also paid. By virtue of the said share purchase agreements, the land measuring an extent of 23.7134 acres purchased by the claimant in the name of NDPL and the land measuring an extent of 19.08 acres purchased in the name of VDPL, totally, to an extent of 42.79 acres were transferred in favour of the respondent.

26. The learned Senior Counsel, therefore, contended that the share purchase agreements, dated 22.11.2007 were independent agreements intended to transfer the 100% shares standing in the names of NDPL and VDPL in favour of the respondent and the same were in no way interconnected to the MOUs, dated 22.11.2006 and 22.11.2007. That apart, the share purchase agreements were entered into between the two subsidiary Companies of the claimant and the respondent, whereas, the MOUs were agreements between the respondent and the claimant. Therefore, he contended

that even assuming without admitting that Section 56 would stand attracted, by virtue of MOUs, in view of the fact that both the MOUs become impossible for performance, the respondent is entitled to retain the 100% shares purchased from the NDPL and VDPL in the light of Section 56 of the Contract Act, as per the said Section, both the MOUs become void.

27. The learned Senior Counsel further contended that whatever negotiations went on with regard to retransfer of land were separate understanding between the parties, which took place subsequent to the cancellation deeds, and the same has nothing to do with the MOUs. Further, when such cancellation deeds were executed, there was no effort, whatsoever, made by the claimant to cancel, modify or vary the transaction or re-visit the valuation of shares and or the consideration paid under the share purchase agreement and the same were left untouched. Since the sale of the shares under NDPL and VDPL was complete in all respects, the said contracts stood concluded as of November, 2007. Further, it is contended that, as fairly admitted by the learned Senior Counsel for the claimant, it is the claimant, who sought time for payment of the consideration for the purpose of re transfer of the 100% shares standing in the names of NDPL and VDPL in favour of the claimant or their subsidiaries/nominees, as, the claimant informed the respondent that they have investors, who are willing to re-purchase the shares in respect of NDPL and VDPL and once the investors are identified, the claimant would repay the consideration received under the SPA to the respondent together with interest. The respondent, in all fairness, not objected to such course being adopted by the claimant and it is to be noted that at that point of time, the respondent was responding to the claimant for the purpose of the re transfer of the shares in their favour. However, the claimant despite their assurance was not able to identify investors/purchasers by 31.12.2010. Hence, the respondent proceeded in developing the property in respect of NDPL and VDPL.

28. The learned Senior Counsel, therefore, contended that the activities, viz., the communication/negotiation talks went on between the claimant and the respondent with regard to the retransfer of the lands purchased in the names of NDPL and VDPL were separate activities, which would not come under Exs.C.3 and C.6. Therefore, as stated supra, Section 56 of the Contract Act would not stand attracted, and consequently, claim for compensation under Section 65 does not arise. This aspect was rightly appreciated by the learned Single Judge while rejecting the case of the claimant with regard to impossibility of performance under Section 56 of the Contract Act and the consequent claim for compensation under Section 65 of the Contract Act. However, the learned Single Judge having rightly found that Section 56 of the Contract Act would not stand

attracted and the compensation awarded by the Arbitral Tribunal was only for the purpose of balancing the parties, failed to reject the claim of the claimant for compensation on that score.

29. Further, the learned Senior Counsel submitted that in cases, where the contract comes to an end with full accord and satisfaction, on account of repudiation, frustration or breach, no claim can be made for compensation under the said contract. Admittedly, the claimant was not in a position to discharge their obligations under the MOUs and therefore, the MOUs were abandoned by mutual consent of both the parties. Such abandonment of MOUs was done with full accord and satisfaction of both the parties and to put a quietus to the issue, pursuant to abandonment of MOUs, the claimant refunded the advance and the respondent executed three cancellation deeds, by which, advance amount of Rs.12 crore paid by the respondent under three receipts stood cancelled. Thus, it is clear that in view of abandonment of MOUs by mutual consent and by means of three cancellation deeds, all the transactions came to an end and it was with full accord and satisfaction and hence, no claim can be made against each other. Therefore, no claim based on Exs.C.3 and C.6 and Exs.C.7 and C.8 will arise and the respondent is not liable to pay compensation. Further, the learned Senior Counsel drawn our attention to the counter affidavit filed by the respondent in support of O.A.No.598 of 2011, filed by the claimant, wherein, the respondent had clearly stated as follows 'Therefore, the parties were at ad-idem that the terms of the MOU were impossible in its performance and hence, were cancelled and therefore, unenforceable'. The learned Single Judge took note of the said stand and rightly dismissed the Original Application filed by the claimant, which ultimately culminated in the present impugned order. and the said counter affidavit was marked as Ex.C.41. Thus, once MOUs were abandoned and become unenforceable, the same cannot be rejuvenated by way of invoking arbitration clause, nor, can the claimant seek compensation by resorting to application of Section 56 of the Contract Act.

30. Further, the learned Senior Counsel contended that the arbitration proceedings initiated by the claimant without impleading the shareholders, viz., NDPL and VDPL is not maintainable as per the law laid down by the Honourable Supreme Court, in the case of Poonam Vs. State of UP and others reported in CDJ 2015 SC 875. The learned Senior Counsel pointed out that this aspect was rightly considered by the learned Single Judge, while dismissing the Original Application filed by the claimant, in O.A.No.598 of 2011. However, when the claimant preferred O.S.A.No.283 of 2012, despite the respondent raising such a plea, the same was not taken into consideration by the Hon'ble Division Bench and allowed the Appeal. Against which, the respondent filed Special Leave Petition and the Hon'ble

Supreme Court swayed by a thought that since there existed a clause for arbitration in the MOUs, opined that the dispute between the parties can be resolved through the process of arbitration and appointed an Arbitrator to resolve the dispute. The learned Arbitrator pursuant to the claim statement filed by the claimant passed an award aggrieved against which, the respondent filed O.P.No.433 of 2017, raising the similar plea. Therefore, he contended that both the learned Single Judge and the learned Arbitrator failed to take note of this aspect and hence, the award passed in the absence of the shareholders is not sustainable and liable to be set aside on this ground also.

31 The main contention of the learned Senior Counsel for the respondent is that, arbitral award passed by the learned Arbitrator was on equity basis. Admittedly, the dispute was referred before arbitration only for the purpose of retransfer of lands in the names of NDPL and VDPL in favour of the claimant by the respondent. Therefore, learned Arbitrator is expected to find out whether the claimant is entitled to the main relief sought for. It is rather unfortunate that the learned Arbitrator, while rightly declined to grant the main relief for the reason that the claimant took time to find out investors and till the claim statement, they never offered to pay the price received under the SPAs, acted beyond the scope of reference and granted an alternative relief of awarding compensation of Rs.11.90 crore, which is totally erroneous and liable to be rejected. That apart, the award passed is also not sustainable on the ground of non-joinder of necessary parties, as the main relief sought for by the claimant is with regard to retransfer of the lands standings in the names of NDPL and VDPL and the said Companies (NDPL and VDPL) were not impleaded as party to the proceedings. Even the learned Single Judge failed to consider this aspect. It is further contended that the learned Single Judge also gone beyond the scope of Section 34 of the Arbitration and Conciliation Act while passing the impugned order. When the Original Petition itself has been filed seeking to set aside the award passed by the Arbitral Tribunal on the ground that the learned Arbitrator acted beyond the scope of reference, in granting the relief of compensation, the learned Single Judge ought not to have rendered findings that such an award was passed by the learned Arbitrator to balance the parties, which were on surmises and conjectures. Further, the learned Single Judge having rightly found that the commercial transaction between the parties came to an end with the cancellation of the agreement and there cannot any equity in commercial transaction, erred in holding that there was no infirmity in granting compensation as a principle. Therefore, the findings rendered by the learned Single Judge were on surmises and conjectures and not on the basis of pleadings and evidence and they are liable to be set aside.

32. Finally, the learned Senior Counsel,

Mr.T.R.Rajagopalan, summed up his arguments on the following points:-

a) In the case on hand, both the claimant as well as the respondent have abandoned the MOUs by mutual consent. Therefore, the provision contemplated under Section 56 of the Contract Act is not applicable. Consequently, the question of compensation under Section 65 also does not arise. In support of his contention with regard to the non applicability of Section 56 to the present case, reliance was placed on the following reported judgments:-

- i) Ganga Saran Vs. Ram Charan Ram Gopal CDJ 1951 SC 079;
- ii) Satyabrata Ghose Vs. Mugneeram Bangur and Co. CDJ 1953 SC 024;
- iii) Amuruvi Perumal Devasthanam Vs. K.R.Sabapathi Pillai and another; CDJ 1961 MHC 131
- iv) Boothalinga Agencies and V.T.C. Poriaswami Nadar; CDJ 1968 SC 232
- v) Sushila Devi and another Vs. Hari Singh and others CDJ 1971 SC 301; and
- vi) N.G.Vigneshawara Bhat Vs. P.Srikrishna Bhat. CDJ 2006 Ker HC 108.

b) Secondly, it was with full accord and satisfaction the MOUs/Exs.C.3 and C.6 were abandoned and the cancellation deeds were entered into between the claimant and the respondent. Therefore, both the parties are not entitled to make claim against each other based on Exs.C.3 and C.6. Consequently, the question of retransfer of shares based on Exs.C.7. and C.8 does not arise. In support of his contention that the contract, if discharged by performance or by accord and satisfaction, can the same be invoked to seek reference of any dispute to arbitration, reliance was placed on the following decision:-

- i) Nalini Singh Associates Vs. Prime Time IP Media Services Ltd., CDJ 2008 DHC 1924;
- ii) Union of India and others Vs. Hari Singh CDJ 2010 SC 853; and
- iii) Cauvery Coffee Traders Mangalore Vs. Resources (International) Company Ltd., 2011 10 SCC 420.

c) Thirdly, in the case of commercial transaction, the question of applicability of Law of Equity does not arise. Hence, the compensation awarded under Section 65 is not sustainable.

d) The learned Single Judge dealt with the Original Petition beyond the scope of Section 34 and arrived at a finding, which were wholly on the basis of surmises and conjectures and not on the basis of the pleadings and evidence, setforth/adduced by both the parties. In support of such contention, reliance was placed on the following decisions:-

- i) Oil and Natural Gas Corporation Ltd., VS. Saw Pipes Ltd., 2003 (2) CTC 282;
- ii) Hindustan Zinc Ltd Vs. Friends Coal Carbonization 2006 SCC 445;
- iii) Associated Builders Vs. Delhi Development Authority 2015 (1) CTC 191;
- and
- iv) M/s. Bass Constructions rep. By its Proprietrix Vs. Board of Trustees of the Port of Madras, Chennai.

e) The learned Senior Counsel for the respondent at the risk of repetition submitted that when the contract/MOUs entered into between the claimant and the respondent itself have got abandoned by mutual consent, where comes the question of payment of compensation and damages under Sections 56 and 65 of the Contract Act.

f) Similarly, the question of re-transfer of the land standing in the names of NDPL and VDPS in favour of the claimant also does not arise since the share transfer were occurred based on the independent agreements/Exs.C.7 and C.8 entered into between the two subsidiary Companies of the claimant and the respondent and the same has nothing to do with the MOUs/Exs.C.3 and C.6.

g) Lastly, he contended the present claim being time barred, the learned Single Judge ought not to have granted interest and thereby, committed an error.

33. We have heard the elaborate submissions made by the learned Senior Counsels appearing for both the parties and carefully perused the material placed on record.

34. The issues that arise for consideration in both the Appeals are :-

- i) Whether Section 56 of the Contract Act would stand attracted to the case on hand, when the MOUs were abandoned by both the parties with full accord and satisfaction. If so, whether the claim for compensation under Section 65 is sustainable?

ii) Whether the award passed by the Arbitral Tribunal is sustainable in the absence of the shareholders/NDPL and VDPL?

iii) Whether the learned Single Judge while sitting on appeal over the arbitral award has jurisdiction to go beyond the scope of Section 34 of the Act and render findings on surmises and conjectures and not based on the pleadings and evidence of both the parties?

iv) When as per Ex.C.75, it is evident that the loss suffered by the claimant is Rs.11.90 crores, and based on the same, award has been passed, whether the learned Single Judge is right in reducing the compensation in the absence of any plea or argument on such aspect and restricting the interest from the date of filing of the claim statement without assigning any reasons?

35. But, before considering the arguments of both the parties on the aforesaid issues, we are of the view that it would be apposite to analyze the law laid down by the Hon'ble Supreme Court in the matter of setting aside the award passed by the Arbitrator, as the same would succour this Court to dispose of both the Appeals:-

a) In the judgment reported in (2011) 11 Scale 668 : [P.R.Shah, Shares & Stock Broker (P) Ltd., Vs. M/s.B.H.H. Securities (P) Ltd.,] the Hon'ble Supreme Court held as follows:-

"the Court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Arbitration and Conciliation Act, 1996.

b) In the judgment reported in (2003) 5 SCC 705 [Oil and Natural Gas Corporation Vs. Saw Pipes Ltd.,] the Hon'ble Supreme Court, after analyzing the law on this aspect, has laid down certain principles and the same is reproduced infra:-

" A. (1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

2) The Court may set aside the award:-

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:-

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

- (b) the interest of India; or
- (c) justice or morality, or
- (d) if it is patently illegal.

(4) It could be challenged:-

- (a) as provided under Section 13(5); and
- (b) Section 16(6) of the Act."

Illegality must go into the root of the matter and if the illegality is of trivial in nature, it cannot be held that the award is against the public policy. Award could also be set aside, if it is so unfair and unreasonable that it shocks the conscience of the court."

c) The same principle was also reiterated in the judgement reported in (2008) 13 SCC 80 [Delhi Development Authority Vs. R.S.Sharma and Comp. New Delhi] which was followed in the case of Associate Builders Vs Delhi Development Authority, (2015) 3 SCC 4, wherein, the Hon'ble Supreme Court has laid down the following principles:-

- " A) An award, which is
 - i)contrary to substantive provisions of law; or
 - iii)the provisions of the Arbitration and Conciliation Act, 1996, ' or
 - iv)against the terms of the respective contract ; or
 - v)patently illegal; or
 - vi)prejudicial to the rights of the parties; is open to interference by the court under Section 34 (2) of the Act.

B) The award could be set aside, if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India ; or
- c) justice or morality,

C) The award could also be set aside, if it is so unfair and unreasonable that it shocks the conscience of the court.

D) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India"

36. Thus, bearing the above principles in mind, we will have to consider the arguments advanced by the learned counsel for the parties on the aforesaid four issues regarding and have to find out whether the award passed by the learned Arbitrator is liable to be confirmed as sought for by the claimant in O.S.A.No.81 of 2018 or liable to be set aside as sought for by the respondent in O.S.A.No.94 of 2018 and whether, the impugned order passed by the learned Judge requires modification

37. Issue No.i

i) It is an admitted fact that both the claimant and the respondent entered into a MOU-Ex.C.3 for the purpose of acquisition of 1000 acres of land by the claimant to the respondent. Since the claimant got two incorporated Companies, they were brought into existence for the purpose of acquiring 1000 acres of land and transfer the same in favour of the respondent Company. The obligations under MOU/Ex.C.3 and Ex.C.6 can be carried out either by the claimant or by the associated Companies of the claimant. Even when the respondent paid an advance amount of Rs.12 crore, it was paid not only to the claimant but also to the claimant's two associated Companies under three receipts, marked as Exs.C.23, C.24 and C.25, Therefore, it could be easily inferred that any transaction between the associated Companies of the claimant, viz., NDPL and VDPL and respondent would arise as part and parcel of the Exs.C.3 and C.6.

ii) Since the claimant sought for certain modifications, the MOU/Ex.C.3 dated 22.11.2006 was amended by MOU-Ex.C.6, dated 22.11.2007. It is to be noted here that, on the same day, when the amended MOU was made, another share purchase agreements/Ex.C.7 and C.8 were entered into between the two associated Companies of the claimant (i.e. NDPL and VDPL) and the respondent. As per the terms and conditions of the share purchase agreements, all the shares standing in the names of NDPL and VDPL got transferred in favour of the respondent and their nominees, for which, consideration was fixed and the same was also paid. Hence, the transaction that took place between the respondent and the NDPL and VDPL under the share purchase agreements were not different from the obligations under the Exs.C.3 and C.6.

iii) Since the claimant even after extension of time by virtue of the amended MOU/Ex.C.6 was not able to perform the contract by procuring 1000 acres of land within the stipulated time and sustained loss at a sum of Rs.11.92 crore in respect of

purchase of 42.79 acres of land, which fact was even admitted by the respondent in his cross-examination and further proved by document, Ex.C.75, and the claimant expressed difficulty to perform the contract, it was decided by both the parties to abandon the MOUs and accordingly, the MOUs were abandoned by mutual consent.

iv) Thereafter, both the parties were discussing about the methods of disgorging the benefits derived under the MOUs as could be deduced from the e-mail correspondences between the parties, marked as Exs.C.13, C.14, C.15, C.17 and C.18. As per the said arrangement arrived at between the parties, the claimant refunded Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) to the respondent and the respondent, by documents, dated 22.10.2010, marked as Exs.C.23 to C.25, prepared three cancellation deeds, acknowledging receipt of Rs.14.08 crore and cancelling the three receipts, dated 03.05.2007, under which, advance amount was paid by the respondent at the time of entering into MOU/Ex.C.3.

v) So far as the balance advance sum of Rs.2 crore is concerned, the same was refunded on 22.11.2007, by the claimant to the respondent, vide cheque dated 28.11.2007, marked as Ex.C.5. Subsequently, there was an understanding between the parties that the claimant would pay consideration for the share purchase agreements with interest at the rate of 12% p.a so that the respondent can retransfer the shares of the NDPL and VDPL in favour of the claimant. However, as fairly admitted by the learned Senior Counsel for the claimant, the claimant sought time for payment of consideration for such re transfer, as the claimant informed the respondent that they have investors to re-purchase the shares in respect of NDPL and VDPL and once the investors were identified, the claimant would repay the consideration received under the SPAs, for which, the respondent accepted. The most significant factor to be noted is that, no time limit was fixed for completion of such transaction. Only when the claimant, by e-mail dated 01.04.2011, Ex.C.33, called upon the respondent to fix a time to conclude the transaction of re-transferring the shares from NDPL and VDP, the respondent, viz., letter dated 02.04.2011, expressed their unwillingness to perform the obligation under the MOUs.

vi) Further, from the conduct of the parties, the correspondences exchanged between them and the oral evidence enunciated by C.W.1 and R.W.1 would clearly establish the fact that in view of abandonment of MOUs there was an understanding between the claimant and the respondent with regard to re-transfer of the lands in favour of the claimant, and in pursuance thereof, the claimant refunded the advance sum of

Rs.10 Crore, and the respondent, in turn, had to retransfer the shares of NDPL and VDPL in favour of the claimant. But the respondent had only cancelled the three receipts issued at the time of entering into MOUs but had not re transferred the lands, rather taken a different stand by sending a letter dated 02.04.2011, Ex.C.34, indicating that once MOUs were abandoned, no claim can be made against each other, and MOUs and Share Purchase Agreements were independent agreements and both cannot be interlinked, and they were constrained to wriggle out of their obligation to re transfer the 100% shares standing in the names of NDPL and VDPL.

vii) From the very fact that the respondent issued a letter dated 02.04.2011, indicating that they were constrained to wriggle out of their obligation to re transfer the 100% shares standing in the names of NDPL and VDPL itself would establish the fact that there was understanding between the parties to retransfer the lands in favour of the claimant and as contended by the claimant the respondent failed to keep up the word as agreed upon rather acted treacherously in order to avoid payment of compensation to the claimant and proceeded to develop the properties, which necessitated the claimant to invoke the arbitration clause and issue a legal notice dated 18.07.2011, marked as Ex.C.37.

viii) Though the respondent took a specific stand that the MOUs were abandoned with full accord and satisfaction by the parties, no claim can be made against each other based on the MOUs, it is pertinent to mention here, that it is with the same accord and satisfaction, the parties entered into another alternate arrangement i.e. to retransfer the 100% shares standing in the names of NDPL and VDPL in favour of the claimant, and since the respondent insisted to repay the advance paid by them, so as to enable them to windup the joint development agreement with M/s.Peacock Finvest Pvt. Ltd, dated 01.11.2006, the claimant refunded Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) to the respondent, hoping that the respondent would re transfer the lands standings in the names of NDPL and VDPL in their favour. But the respondent failed to retransfer the lands as agreed upon by them.

ix) Though it is the case of the respondent that the claimant took time to find out investors and despite their assurance, the claimant was not able to identify purchasers by 31.12.2010, respondent waiting till 2011, proceeded in developing the property in respect of NDPL and VDPL, before doing so, the claimant should be put on notice with regard to the development of the properties in respect of NDPL and VDPL. On the other hand, only when the claimant called upon the respondent to fix a time to conclude the transaction of re-

transferring the shares from NDPL and VDP, by e-mail dated 01.04.2011, Ex.C.33, the respondent by letter dated 02.04.2011, expressed their unwillingness to perform the obligation under the MOUs. Since the respondent changed their mind and proceeded to develop the properties standing in the names of the NDPL and VDPL, the claimant filed Original Application under Section 9 of the Arbitration and Conciliation Act, 1996, in O.A.No.598 of 2011, and obtained an order of status-quo, restraining the respondent from in any manner alienating/encumbering the lands described in the schedule to the Judge's summon, which ultimately ended in referring the dispute before arbitration.

x) Though the learned Senior Counsel for the respondent may take advantage of the admission made by the learned Senior Counsel for the claimant that the claimant took time to find out investors for the purpose of re transfer of the 100% shares standing in the names of NDPL and VDPL, respondent proceeded in developing the property in respect of NDPL and VDPL, the truth that emanates from such admission is the acceptance of the respondent in regard to retransfer of lands in favour of the claimant in view of abandonment of MOUs.

xi) Therefore, it is seen that due to abandonment of MOUs, both the MOUs become impossible of performance, and owing to the understanding arrived at between the parties to disgorge the benefits derived at under the MOUs, the claimant has to refund the advance sum, which the claimant has already done and so far the respondent is concerned, they have to retransfer the lands in the names of NDPL and VDPL in favour of the claimant. Since the respondent did not act in accordance with the terms of the understanding entered into, the claimant invoked arbitration clause, which culminated in the award, ultimately resulting in filing of the present two Appeals.

xii) Further, we would like to point out that the learned Arbitrator while dealing with the main prayer sought for by the claimant i.e. with regard to transfer of shares of NDPL and VDPL in their favour, rightly found that the claimant took time to find out investors and till the claim statement, they never offered to pay the price and on account of the delay on the part of the claimant, the learned Arbitrator rightly declined to grant the specific relief for retransfer of the lands standing in the names of NDPL and VDPL and as an alternate measure, granted the the compensation for the loss/damages suffered by the claimant, by applying Sections 56 and 65 of the Contract Act.

xiii) However, the learned Single Judge held that though he is accepting that there is impossibility of performance of contract/MOUs, however, not inclined to accept the applicability

of Section 56 of the Contract Act due to the reason that, in a commercial transaction, there is no question of impossibility of performance and hence, the provisions contemplated under Section 56 of the Contract Act does not come into picture. However, the learned Single Judge accepted the findings of the learned Arbitrator. But, we are not in a position to accept the findings of the learned Single Judge due to the reason that, in the present case, both the MOUs were abandoned with consent of both the parties. Subsequent to the abandonment of the MOUs, the parties themselves have discussed and mutually agreed to disgorge the benefits derived under the MOUs, as evidenced by Exs.C.13, C.14, C.15, C.17, and C.18. The claimant agreed to refund the advance sum of Rs.10 crore with interest at 12% and the respondent agreed to retransfer the 100% shares standing in the names of NDPL and VDPL in favour of the claimant.

xiv) Thus, it is clear that subsequent to the abandonment of MOUs, both the parties together made a fresh arrangement to recoup the loss. As far as the claimant is concerned, they have completed their obligation, by refunding Rs.14.08 crore (Rs.10 crore with interest at 12 % p.a from the date of payment) to the respondent and the respondent also received the same, as evident from the demanded drafts, dated 22.10.2010, Exs.C-23 to 25. On the other hand, the respondent failed to carryout out their obligations by retransferring 100% shares standing in the names of NDPL and VDPL in favour of the claimant, and vide letter dated 02.04.2011, marked as Ex.C.34, stated that they were constrained to wriggle out of their obligation as agreed earlier. In such circumstances, the learned Arbitrator considered the alternate prayer of the claimant with regard to payment of compensation of Rs.11.90 crore. In fact, the respondent also admitted the fact that the loss suffered by the claimant in regard to purchase of lands in the names of NDPL and VDPL is Rs.11.90 crore during the cross examination of R.W.1 and further vide document, marked as Ex.C.75. Therefore, the findings of the learned Arbitrator for payment of compensation of Rs.11.90 crore is in accordance with the terms of the contract entered into between the claimant and the respondent, which took place subsequent to the abandonment of MOUs. Therefore, the respondent is bound to pay the said loss of Rs.11.90 crore along with interest. Even otherwise, the provisions of Sections 56 and 65 of the Contract Act are not applicable, as pleaded by the respondent and they are liable to pay compensation as per the arrangement/pact entered into between them, as evident from Exs.C.13, 14, 15, 17 and 18 which was the outcome of abandonment of MOUs, Exs.C.3 and C.6.

38. Issue No.ii

i) The issue raised by the respondent that the arbitration proceedings initiated by the claimant in the absence of shareholders, viz., NDPL and VDPL is not maintainable as they

are necessary parties to be impleaded and therefore, the award passed by the arbitral Tribunal in their absence is liable to be set aside appears to be shallow and tedious, for two reasons. Firstly, when the matter went up before the Hon'ble Supreme Court, by way of Special Leave Petition filed by the respondent challenging the judgment passed in O.S.A.No.283 of 2012, it is agreed by the respondent to refer to dispute before arbitration, notwithstanding such a plea and only based on the consent of both the parties, the Hon'ble Supreme Court disposed of the Special Leave Petition with an observation that 'irrespective of whether or not there is arbitration agreement, it would be appropriate, if the dispute between the parties are resolved through the process of arbitration and as per the arbitration clause, the learned Arbitrator will decide all the issues, and appointed Hon'ble Justice Kanakaraj (retd.) as Sole Arbitrator to resolve the dispute. Therefore, when the respondent gave consent for referring the dispute before the Arbitrator, it is not fair on their part to turnaround and say the arbitration proceedings in the absence of the shareholders of NDPL and VDPL is not maintainable. Secondly, as per the terms of MOUs, land measuring 1000 acres can be purchased in favour of the respondent either by the claimant directly or through the sister Concerns concerned, which would clearly show that on behalf of the associated Companies, only the claimant can initiate proceedings and accordingly, the claimant initiated the proceedings against the respondent to pay compensation in terms of MOUs to the claimant and its associated Companies. In such case, there is no necessity to implead its sister concerns.

39. Issue No.iii) and iv)

Before answering these issues, we would like to club these issues together. Accordingly, both the issues were clubbed together

i) On a perusal of the impugned order, we are in full agreement with the contentions put forth by the learned Senior Counsel for both the parties that the learned Single Judge dealt with the Original Petition beyond the ambit and scope of Section 34 of the Arbitration and Conciliation Act.

ii) It is a trite law that the scope of 34 is very limited and the learned Single Judge while sitting on appeal over the arbitral award is expected to render findings only on the basis of pleadings and evidence adduced by the parties and not as per whims and fancies.

iii) In the case on hand, it is patently clear that the learned Single Judge has travelled beyond the scope of Section 34 and rendered findings based on surmises and conjectures. As rightly pointed out by the learned Senior Counsel for the

claimant, the findings of the learned Single Judge in para Nos. 40 and 41 are all unwarranted as they are not supported either by pleadings or evidence adduced by both the parties but based on surmises and conjecture and liable to be set aside. Similarly, we would like to point out that the respondent filed Original Petition No.433 of 2017 seeking to set aside the award of the Arbitral Tribunal and in the absence of any issue or argument raised with regard to award of proportionate compensation, the calculation worked out by the learned Single Judge in para Nos. 70 and 71 for the purpose of reducing the compensation, which were based on surmises and conjectures are all unwarranted. Admittedly, the workings on sale of shares in the names of NDPL and VDPL has been marked before the Arbitral Tribunal as Ex.C.75 through R.W.1, and the said document clearly shows that the loss incurred by the claimant in respect of purchase of 42.79 acres of land in the names of the sister Companies is Rs.11.92 crore and based on the same, the Arbitral Tribunal considered and awarded compensation with interest. This was not properly appreciated by the learned Single Judge and based on his own findings and calculation, reduced the compensation and restricted the interest without assigning any reasons. Therefore, we do not have any hesitation to hold that the learned Single Judge has dealt with the Petition beyond the scope of Section 34 of the Act.

iv) As far as the interest portions is concerned, the Hon'ble Supreme Court in the case of Hyber Consulting UK Ltd., Vs. Governor State of Orissa held that Arbitrator is empowered to award interest on three stages, which are as follows

i) From the date of cause of action till the date of initiation of arbitral proceedings;

ii) From the date of initiation of arbitral proceedings till the date of arbitral award;

iii) From the date of arbitral award and till the date of realization.

40. We also agree with the proposition laid down by the Hon'ble Supreme Court in the case of Hyber Consulting UK Ltd. (supra) and inclined to apply the same to the case on hand.

41. As noticed above, both the MOUs were abandoned by way of mutual consent. After mutual consent, both the parties agreed to disgorge the benefits derived under the MOUs and as per the said agreement, the claimant refunded the advance amount along with interest. While the claimant refunded the advance amount with interest, the respondent, in turn, should transfer the 100% shares in the names of NDPL and VDPL, in favour of the claimant. This fact was also admitted by both the parties. In such

circumstances, with regard to retransfer the shares of NDPL and VDPL, negotiations were going on between the parties and as fairly admitted by the learned Senior Counsel for the claimant, the claimant sought time for payment of consideration received under the share purchase agreements to the respondent together with interest, as they have investors, who are willing to repurchase the shares in respect of NDPL and VDPL and once the investors are identified, the claimant would repay the consideration and it is based on such request made by the claimant, the respondent was waiting till 2011. It was only in the year 2011, Mr.Ashish Puravankar, the Joint Managing Director of the respondent issued a letter dated 02.04.2011 indicating that the respondent was constrained to wriggle out of their obligation to retransfer the 100% shares standing in the name of NDPL and VDPL, as agreed earlier due to the reason that they wanted to develop the properties.

42. Thus, from the above narrated short facts, it is clear that the claimant failed to take necessary steps to find out appropriate investors so as to enable the respondent to retransfer the shares standing in the names of NDPL and VDPL in favour of the claimant, despite sufficient time provided by the respondent. The respondent also without proper intimation by way of last chance, issued a letter dated 02.04.2011 stating that they wanted to wriggle out of their obligations under the MOUs and proceeded to develop the properties. Under such circumstances, claim was filed and the learned Arbitrator applied his mind and with an intention to balance the parties, passed an award fixing the compensation at Rs.11.90 crores, which is towards the loss suffered by the claimant for the purchase of lands in the names of NDPL and VDPL. Originally, both the parties agreed only for the retransfer of the lands. In fact, main relief sought for by the claimant was also with regard to such retransfer. However, since the claimant sought for an alternate relief, such alternate relief was considered and the learned Arbitrator granted compensation.

i) In other words, the learned Arbitrator would have passed award only with regard to retransfer of the lands, and in such case, there is no possibility for awarding interest. Thus, due to delay on the part of the claimant in finding out appropriate investors for the purpose of purchase of shares standing in the names of NDPL and VDPL, the respondent cannot be mulcted by way of awarding interest from the date of claim filed by the claimant. However, since the loss suffered by the claimant is of Rs.11.90 crores, we are inclined to award interest at the rate of 8% p.a. from the date of award till the date of realization and the reason for fixing 8% is owing to the fact that the claimant had refunded the advance sum along with interest at 12% p.a., which was only to retransfer the lands not for payment of the compensation of Rs.11.90 with interest.

Further, we feel that it would not be appropriate to award 12% interest p.a. from the date of the passing the award.

43. Thus, while setting aside the order passed by the learned Single Judge and confirming the award passed by the Arbitral Tribunal, we are inclined to interfere only with the interest awarded by the Arbitral Tribunal, which was modified to the extent at the rate of 8% p.a. from 12% p.a. on the compensation amount awarded by the Arbitral Tribunal from the date of the award and till the date of realization. Though the learned Senior Counsel for the respondent relied upon the judgments in support of their case, and drawn our attention to the relevant paras in each of the judgments to buttress his contentions, except, the judgments related to the scope of Section 34 of the Arbitration and Conciliation Act, other judgments relating to various aspects of the matter are of no avail to the respondent, in the light of the reasons assigned by us while answering each of the Issues involved herein.

44. Resultantly, the O.S.A.No.81 of 2018 filed by the claimant is allowed with the modification, as indicated above and the O.S.A.No.94 of 2018 filed by the respondent stands dismissed. Consequently, Civil Miscellaneous Petition is closed. The parties shall bear their own costs.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

sd
To

1. The Sub Assistant Registrar (Original Side),
High Court, Madras.

+1 CC to M/s.R.Ramya, Advocate sr 9064

+3 CCS to M/s.Paul & Paul Advocate sr 9075.

Original Side Appeal Nos.81 and 94 of 2018

SP(08/03/2019)